DOCUMENT RESUME

ED 141 869 CS 501 785

AUTHOR Lacy, Nick
TITLE Photography v. Privacy.
INSTITUTION Freedom of Information Center, Columbia, Mo.
REPORT NO FOI-374
PUB DATE Jul 77
NOTE 8p.; Some parts may be marginally legible due to small print of the original document

EDRS PRICE MF-$0.83 HC-$1.67 Plus Postage.
DESCRIPTORS Censorship; *Civil Liberties; Constitutional Law; *Court Litigation; *Freedom of Speech; *Journalism; Laws; Legal Problems; *Photography; *Privacy
IDENTIFIERS *Freedom of Information

ABSTRACT

This report discusses how courts have dealt with the use of photographs for journalistic purposes in cases where invasion of privacy was alleged. In the context of this survey of relevant case law, the following topics are addressed: the right of privacy, the 1937 guidelines for cases involving photographs that accompany articles, "legitimate public interest" in newsworthy events and public figures, the question of the lapse of time between taking a photograph and publishing it, and the concept of "false light"--the misrepresentation of the motives or behaviors of those who are photographed. In addition, the effect of the press's disregard for accuracy, official investigations of the question of representation of individuals in a false light, and limitations upon photographers are discussed. (KS)

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JULY, 1977

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FREEDOM OF INFORMATION CENTER REPORT NO. 374

PHOTOGRAPHY V. PRIVACY

This report was written by Nick Lacy, an M.A. candidate at the University of Missouri School of Journalism.

Conflict Inevitable

The development of the right of privacy is of recent origin in relation to other aspects of an individual's rights. It began in 1890 with the Warren-Brandeis article "The Right To Privacy" in the *Harvard Law Review* and has progressed to a point where six states recognize a right of privacy with statutes, while most of the rest have acknowledged the "right to be let alone" by court decisions. These court decisions have been made with little guidance from the Supreme Court, which has heard only four cases dealing with privacy questions—the first one in 1967.

The absence of Supreme Court decisions regarding privacy is interesting because a person's right of privacy and the freedom of the press are mutually antagonistic. Even on the surface, there exists an inherent conflict between one's right to keep things secret and someone else's right to inform the public. The Warren-Brandeis article is generally regarded as inspired by the authors' healthy dislike for the Boston press corps of the period.[1]

The majority of invasion of privacy suits feature some arm of the press as defendant. This constant threat of being dragged into court by John or Jane "Private Citizen" Doe for alleged invasion of privacy can conceivably bring about the "chilling effect" so often mentioned in cases dealing with attempts to curtail freedom of the press.

With such a threat possible, why the lack of Supreme Court direction until 1967 with *Time Inc. v. Hill*, 385 U.S. 374, and then only three further cases [*Cantrell v. Forest City Pub. Co.*, 419 U.S. 245 (1974), *Cox Broadcasting Corp. v. Cohen*, 420 U.S. 469 (1975) and *Zacchini v. Scripps-Howard*, 45 LW 4954 (1977)]? The fact is that while only a few states have rejected the concept of a right of privacy, the press has seldom been burned in privacy cases. The press has lost several cases—usually of the false light variety—but burns, where a decision might create a "chilling effect" and thus a constitutional question, have been rare. The press seemingly received quite adequate protection from the courts in matters concerning alleged invasions of privacy, without having to turn to the Supreme Court. A continuous trail of pro-press opinions, albeit with a few switchbacks and digressions, has been established.

This paper will look at this trail as it has developed with regard to photography. (Cases of photographs used for advertising purposes will not be covered.) While most of the court decisions which will be looked at are binding only in the states where the cases were tried, a uniformity in dealing with challenges to photographers has come about throughout the country.

Right of Privacy Defined

Photography is the most obvious threat people probably see to their privacy. There are few photojournalists who have not faced the ire of people who think their picture has been taken. That ire increases with publication of the picture.

One of the earliest cases dealing with the publication of a photograph for journalistic purposes was *Jones v. Herald Post Co.*, 230 Ky. 227 (1929). The pictures in that instance had been "carried away" from the home of the plaintiff following the murder of her husband. Mrs. Jones complained that publication of the pictures was offensive and she sued for trespass of her right of privacy.

In finding for the defendant, the court endorsed what has become a basic defense in privacy suits. The court recognized that there was such a thing as a right of privacy, "defined as the right to live one's life in seclusion, without being subjected to unwarranted and undesired publicity." But then the court said

> There are times, however, when one, whether willingly or not becomes an actor in an occurrence of public or general interest. When this takes place, he emerges from his seclusion, and it is not an invasion of his right of privacy to publish his photograph with an account of such occurrence.[2]

Today, the press probably would have gotten into trouble for the manner in which the pictures were obtained, but the concept of the involuntary public figure and an accompanying forfeiture of right of privacy was placed on the books.

Summary: The author discusses how courts have dealt with the use of photographs for journalistic purposes in cases where invasion of privacy was alleged. In general, photographers have met with restrictions only when a person was presented in a false light.

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CS 501 785

1937 Guidelines

In 1937, *Lahiri v. Daily Mirror Inc.*, 162 Misc. N.Y. 776, was decided in New York. This involved the publication of a picture of a Hindu musician with an article on "rope tricks." In writing the opinion, the court set up four rules to be looked at in cases involving photographs accompanying an article. In summarized fashion, these rules are:

(1) Recovery under the statute may be had if the photograph is published in or as part of an advertisement, or for advertising purposes;
(2) Recovery may be had if the photograph is used in connection with a work of fiction;
(3) No recovery may be had if the photograph is published in connection with an article of current news or immediate public interest; and
(4) No recovery may be had, as a general rule, if the article is educational or informative in character.[3]

The court did introduce the caveat that

> There may, however, be liability under subdivisions 3 and 4 if the photograph used has so tenuous a connection with the news item or educational article that it can be said to have no legitimate relation to it and be used for the purpose of promoting the sale of the publication.[4]

These rules have been used in other states.

"Legitimate Public Interest"

The next case returns us to the birthplace of the idea of a right of privacy. *Themo v. New England Pub. Co.*, 27 N.E.2d 753 (1940), came about when the plaintiff's photograph appeared on the front page of the *Boston American*. The picture showed Themo talking with a policeman. No indication was given as to the circumstances. Themo sued for invasion of privacy and once again the press prevailed.

The court said that this case did not ask it to decide whether the right of privacy was or was not recognized in Massachusetts. Nevertheless, the court went on and set up some standards to follow if such a right were to exist. "If any exists, it does not protect one from having his name or his likeness appear in a newspaper when there is a legitimate public interest in his existence, his experiences, his words, or his acts."[5] The court then wrote

> The courts in question stated no case unless the plaintiffs under all conceivable circumstances had an absolute legal right to exclude from a newspaper any photograph of them taken without their permission. If every person has such a right, no newspaper could lawfully publish a photograph of a parade or a street scene. We are not prepared to sustain the assertion of such a right.[6]

The court did give a broad privilege here to a photographer's need to be able to record society in all of its forms. Many people are quite protective of their anonymity within society. The role of a photojournalist is in confrontation with that desire whenever the person steps out of his or her home and into the public domain. If, as Themo and others insisted, their right of privacy or anonymity existed wherever they went or whatever they did, the resulting infringement on freedom of the press definitely would be "chilling."

Why a picture of Ullian Themo talking to a policeman would be in the public interest is perhaps a bit hazy. A line has to be drawn somewhere, however, and it was Themo's misfortune that the needs of a free press required that the line be drawn to the advantage of the press. The court realized this:

> Great difficulty exists in defining a right of privacy that will protect individuals against abuse and yet will not infringe the rights of the public and the press to discuss personalities. In Winfield, Law of Torts (1937), 669, it is said, "it is only offensive invasion of privacy that is really objectionable and that ought to be made unlawful. 'Offensive' is a vague term, but the judges could be safely entrusted with the task of deciding whether there were evidence enough of such offensiveness to go to the jury. There is no need to stop the propagation of news—even silly news—about people, or to stifle curiosity—even vulgar curiosity—about a neighbor's affairs. But there is a difference . . . between ordinary inquisitiveness and unscrupulous abuse of a person's privacy for advertising or other purposes."[7]

Two decisions dealing with photographs and the right of privacy were given in 1948. In *Peay v. Curtis Pub. Co.*, 78 F.Supp. 305, the defendant's motion to dismiss was denied. In *Berg v. Minneapolis Star & Tribune Co.*, 79 F. Supp. 957, the defendant's motion for dismissal was granted.

The *Berg* case was fairly straightforward and reaffirmed the right to publish phtotographs relevant to a newsworthy story or a story with a legitimate public interest. By 1948, the court noted in quoting from 138 A.L.R. p. 78,

> it is settled that the publication of a person's name or picture in connection with the news or historical event of legitimate public interest does not constitute an actionable invasion of the right of privacy.[8]

The pictures in the *Berg* case were of Berg in a courtroom during a recess of an interesting divorce case. The pictures, along with one of Berg's ex-wife and their children, ran with an article about the case. In the *Peay* case the photograph ran as an illustration in the *Saturday Evening Post* for a biting satire on taxi drivers in Washington, D.C. Peay claimed that she had been libelled and that her right of privacy had been violated.

In sending the case back to be tried by a jury, the court came down hard on the use of photographs taken and used without consent.

> Modern life with its accompanying increase in public media of communication, such as newspapers, monthly and weekly magazines, moving pictures, radio and television, has created novel situations, that in turn gave rise to the problem of protecting the individual who desires seclusion and freedom from intrusion into his private life as well

> as from undue and undesirable publicity, such as is involved in the circulation of his likeness without his permission. Such an invasion is akin to a publication of private letters and memoranda, which the law forbids as an encroachment of a property interest. The law has recognized the right of privacy. The publication of a photograph of a private person without his sanction is a violation of this right.[9]

This is an example of what was meant earlier by being burned. The court did acknowledge an exception to this right for public figures, but no exception was given to pictures of events of public interest. No exception was given to pictures taken in the public sector. No exception for unwilling public figures. Fortunately, this type of strict interpretation has not held sway in many places.

Public Figures

In *Martin v. Dorton*, 210 Miss. 668 (1951), the defendant was actually the party claiming invasion of privacy. Martin was a county sheriff charged with assault and battery on the person of Dorton. Dorton, a photographer, had taken Martin's picture despite being told not to by Martin. In his defense, the sheriff claimed invasion of his privacy and also claimed that Dorton had struck the first blow by taking his picture. Martin's claims met with a stony reception.

> . . . one who engages in public affairs and public life to an extent which draws the public interest upon him may be deemed to have consented to the publication of his name and photograph in connection with a legitimate news story . . .[10]

The court also recognized the problem of involuntary public figures and went along with the "preponderance of authority" giving the press the right to report their activities.

The court did offer some words of comfort to all public figures and involuntary public figures who found themselves dealing with photographers:

> While it is true that the modern invention of instantaneous photography now in vogue is such as to afford the means of securing a portraiture of an individual's face and form without first giving an opportunity in advance for adequate adjustment of the facial expression, wearing apparel and posture of the person to be photographed, and often may not result in a good likeness being obtained such as would be pleasing to the officer and to his admiring friends and constituents, it is nevertheless not a sufficient ground to justify an assault and battery on an otherwise nonoffensive photographer. If a servant of the dear people is thus humiliated by a published photograph that does not seem to do justice to him, the law leaves his feelings of disappointment and chagrin to be helped and vindicated by the tremendous force of public sympathy.[11]

Lapse of Time

In 1947, Eleanor Sue Leverton was almost killed by a car through no fault of her own. A photographer happened to be there and took a picture which was published the next day. *Leverton v. Curtis Pub. Co.*, 192 F.2d 974 (1951), was an invasion of privacy suite against Curtis for using the same picture 20 months later with an article on pedestrian carelessness.

All sides in the case agreed that the original use of the photograph was not actionable. All sides agreed that there was such a thing as a right of privacy. The questions, then, were: (1) whether the privilege to publish the picture was "lost by lapse of time" and (2) whether the privilege was lost by using the picture with an article which placed a different interpretation on the facts behind the accident (i.e., that the girl in the picture was at fault).

The court, referring to the *Sidis* decision, held that lapse of time did not affect the privilege to publish. But, the court said, the privilege was lost by the use to which the picture had been put.

> Granted that she was "newsworthy" with regard to her traffic accident. Assume, also, that she continued to be newsworthy with regard to that particular accident for an indefinite time afterward. This use of her picture had nothing at all to do with her accident. It related to the general subject of traffic accidents and pedestrian carelessness. . . . The picture is used in connection with several headings tending to say that this plaintiff narrowly escaped death because she was careless of her own safety. . . . The sum total of all this is that this particular plaintiff, the legitimate subject for publicity for one particular accident, now becomes a pictorial, frightful example of pedestrian carelessness. This, we think, exceeds the bounds of privilege.[12]

False Light

Leverton and *Peay* were similar cases. They dealt with presenting a person in a false light and this has, indeed, turned into the major problem in photography-privacy cases. It may not always be the photographer's fault in such cases but rather the editor's poor luck in selecting pictures to illustrate articles.

In 1951 a series of cases began. At issue was a picture taken by Henri Cartier-Bresson of a couple sitting together: "plaintiff, Mr. Gill, has his arm around his wife and is leaning forward with his cheek against hers."

In October, 1947, the picture appeared in *Harper's Bazaar*, a Hearst publication. In May, 1949, it was published in *Ladies Home Journal*, a Curtis publication. The Gills commenced separate suits against both companies for invasion of privacy. These cases seem terribly confusing.

There were three decisions dealing with the *Harper's Bazaar* picture. In May, 1951, the District Court of Appeals, Second District in California, said

> It cannot be said that any detriment is suffered by a person from the mere printing and display of his photograph when it does not show him in an uncomplimentary pose or tend to humiliate him or in any sense present him to his discredit or disadvantage. The publication of a photograph should not be offensive to persons of ordinary sensibilities . . . Where the intrusion does not go so far as to be beyond the limits of decency, no liability accrues.[13]

In January, 1952, the supreme court of California saw things differently.

> We believe, moreover, that plaintiffs have stated a cause of action for an infringement on their right of privacy by the publication without their consent of the photograph standing alone. Members of opposite sexes engaging in amorous demonstrations should be protected from the broadcast of that most intimate relation. . . . That should be true even though the display is in a public place. . . . We fail, however, to see any substantial public interest in the bare publication of a picture of a couple in an amorous pose. . . . Nor can we say, as a matter of law, that picturing persons in such poses would not outrage or injure the feelings of an ordinary person.[14]

But in February, 1953, the same judge wrote that the Gills had

> voluntarily exposed themselves to public gaze in a pose open to the view of any persons who might then be at or near their place of business. By their own voluntary action plaintiffs waived their right of privacy so far as this particular pose was assumed, 1 Am. Jur., Privacy sec. 17, p. 937, for "There can be no privacy in that which is already public."[15]

The court added that the Gills never showed evidence of a case where "a mere photograph" taken of a voluntary and public pose which did not "shock the ordinary sense of decency or propriety" had been shown to be actionable. The court then referred to the *Themo* case and the remarks about anyone being able to stop publication of a photograph.

In other words, following a nifty loop-the-loop, actions in the public sector became fair game for photographers. The catch, as was expressed in *Peay, Leverton* and *Gill v. Curtis Pub. Co.*, is in casting a false light on those actions.

Curtis, which seems to have a propensity for getting involved in this type of case, bought the picture from Hearst and used it as an illustration for an article on love. The caption with the picture and later parts of the article made it appear that the Gills were an example of the "wrong" type of love; i.e., love at first sight with an attraction based solely on sex.

In both decisions on this case, the district court (231 P.2d 565) and the supreme court (239 P.2d 630) found for the plaintiffs. Taking the three elements—picture, caption and article—together, the court of appeals wrote that "it cannot be said that it does not offend persons of ordinary sensibilities."[16] And, the court said, liability in invasion of privacy cases "exists only if the defendant's conduct was such that he should have realized that it would offend persons of ordinary sensibilities."[17]

In agreeing with the court of appeals, the supreme court looked at the need for a right of privacy:

> In the formative period of the common law, before the day of newspapers, radio, and photography, when life was simple and human relations more direct, the individual could himself adequately protect his privacy. Today this would be impossible . . . Freedom of speech and freedom of the press have been urged as a ground for denying the existence of the right of privacy. The right of privacy does undoubtedly infringe upon absolute freedom of speech and of the press, and it also clashes with the interest of the public in having a free dissemination of news and information. These paramount public interests must be taken into account in placing the necessary limitations upon the right of privacy. But if this right of the individual is not without qualifications, neither is freedom of speech and of the press unlimited. The latter privilege is subject to the qualification that it shall not be so exercised as to abuse the rights of individuals. Accordingly, it is held by courts recognizing the right of privacy that the constitutional guarantees of freedom of speech and of the press do not warrant the publication of matter constituting an invasion of the right of privacy any more than they give the right to defame a person.[18]

In three cases referred to in this paper, liability was assessed when the photograph tended to throw a false light upon the subject(s) and was deemed to be offensive to a person of ordinary sensibilities. In all three cases, however, the picture standing alone could not really be considered an invasion of a person's privacy. The words accompanying the photograph made the incursion into the individual's privacy actionable and liable.

The courts did not appear to consider this as in any way a threat to the freedom of the press to carry out its functions or to the public's right to be informed. What was being asked of the press was that it be sure of the background of a photograph before using it. This type of request could actually become a very open-ended wrench that might conceivably do to the press just what the court in *Themo* refused to do.

The Supreme Court realized this threat when it wrote the opinion in *Time Inc. v. Hill*, 385 U.S. 374 (1967). In deciding that the *New York Times v. Sullivan* standards for libel extended into privacy, the Court addressed itself to the problem of false light.

> We create a grave risk of serious impairment of the indispensable service of a free press in a free society if we saddle the press with the impossible burden of verifying to a certainty the facts associated in news articles with a person's name, picture or portrait, particularly as related to non-defamatory matter.
>
> . . . sanctions against either innocent or negligent misstatement would present a grave hazard to discouraging the press from exercising the constitutional guarantees. Those guarantees are not for the benefit of the press so much as for the benefit of us all. A broadly defined freedom of the press assures the maintenance of our political system and an open society. Fear of large verdicts in damage suits for innocent or merely negligent misstatement, even fear of the expense involved in their defense, must inevitably cause publishers to "steer . . . wider of the unlawful zone."[19]

On the right of privacy in itself, a majority of the Court said:

> Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value in freedom of speech and of press.[20]

The usual method by which the right of privacy had come into existence—through court decisions—drew this comment from Justice Black in a concurring opinion:

> If judges have, however, by their own fiat today created a right of privacy equal to or superior to the right of a free press that the Constitution created, then tomorrow and the next day and the next, judges can create more rights that balance away other cherished Bill of Rights freedoms.[21]

Reckless Disregard

Since the *Hill* decision, the press—and photographers—have been protected in privacy cases as long as publication was not made with actual malice or reckless disregard of the facts. The question remains as to what constitutes reckless disregard. How thorough a check should be conducted before running the picture of an accident victim with a story on pedestrian carelessness? At what point would the serious doubts of an editor be satisfied? Should a publication be punished for using the best art available to run with an article, which is essentially what happened in the three cases mentioned above? In the cases decided since *Hill*, a good false light case to answer these questions has not come up.

With the possible exception of *Holmes v. Curtis Pub. Co.*, 303 F.Supp. 522 (1969), that is. Once again Curtis published a photograph and attached a questionable caption to it. Holmes was the central figure of a casino picture. The caption was:

> High rollers at Monte Carlo have dropped as much as $20,000 in a single night. The U.S. Department of Justice estimates that the casino grosses $20 million a year, and that one-third is skimmed for American Mafia "families."

According to the court, the article was in the public interest and thus subject to the *New York Times* standard as per the *Hill* decision. However, the defendant's motion for dismissal was denied.

> As to plaintiff's action for privacy, there appears no question that if it were not for the defendant's caption beneath plaintiff's photograph, this court would be justified in dismissing plaintiff's invasion of privacy cause of action. But such is not the case.[22]

The reason for the emphasis in this paper on false light is simple. False light has been about the only area of the right of privacy where the press has been found subject to liability. Public figures, involuntary public figures, legitimate public interest, even private poses in the public sector have all come under First Amendment protection for a photographer's use. But false light remains the problem.

The Restatement of the Law—Second, Tentative Draft No. 21 (April, 1975) says that in false light cases, liability is present if

(a) the false light in which the other was placed would be highly offensive to a reasonable person, and

(b) the actor had knowledge of the falsity or acted in reckless disregard of it.[23]

In Tentative Draft No. 13 (April, 1967) it was stated that protection is being given to

> the interest of the individual in not being made to appear before the public in an objectionable false light or false position, or in other words, otherwise than as he is.[24]

Furthermore, the draft continued, defamation does not necessarily have to be present for a false light suit. "It is enough that he is given unreasonable and highly objectionable publicity which attributes to him characteristics, conducts or beliefs which are false . . ."[25]

In 1974, a second privacy case, *Cantrell v. Forest City Pub. Co.*, 419 U.S. 245, was argued before the Supreme Court. The issue, once again, was false light. This time the Court decided that a reporter had indeed acted with reckless disregard of the facts. But the photographer who accompanied Eszterhas to the Cantrell home was found to be innocent of the charges that the pictures he took had also cast a false light upon the Cantrells.

> Conway testified that the photographs he took were fair and accurate depictions of the people and scenes he found at the Cantrell residence. This testimony was not contradicted by any other evidence introduced at the trial.[26]

Official Investigations

There have been several photography vs. privacy cases since *Cantrell*, but none has dealt with false light. In *Florida Pub. Co. v. Fletcher*, 2 Med L Rptr 1089 (1976), the Florida Supreme Court quashed the decision of the district court of appeals which had reversed the grant of summary judgment in favor of the newspaper.

Fletcher instigated the three-count suit following a fire in her home while she was in New York. One of her daughters was killed and, in the course of the investigation, the fire marshal asked a news photographer to take a picture of the girl's silhouette for the official record. (The firemen had run out of film for their own camera.) No restriction was placed on the photographer's use of the negatives and so the picture was published with an article on the fire in the *Florida Times-Union*.

The three counts of the suit were: (1) trespass and invasion of privacy, (2) invasion of privacy, and (3) intentional infliction of emotional distress. A trial court judge dismissed the second count and granted summary judgment on the other two counts for the defendant. The court of appeals decided that the trial judge had had insufficient proof to grant the summary judgment on the first count but affirmed everything else. Quoting from the trial judge's opinion, the Supreme Court noted

> The court finds that there is no genuine issue of material fact and that as a matter of law an entry, that may otherwise be an actionable trespass, becomes lawful and nonactionable when it is done under common usage, custom and practice.[27]

Unwilling Actors

Nelson v. Globe, 2 Med L Rptr 1219 (1977), reaffirmed previous rulings concerning unwilling actors in a public event and also the little effect that lapse of time has on reinstating a person's right of privacy.

A detective magazine ran a story and picture about the murder of the plaintiff's husband two years after the event.

> Can one who has achieved fame or notoriety, or has been involved in a newsworthy event, regain his right "to be let alone" by the lapse of time? With few exceptions, the cases that have dealt with this question have held that once a person's activities become a matter of public interest, he cannot revert to a private status, or that, under the circumstances, the period of time involved was not sufficient to deprive the publisher of his privilege to report newsworthy events.[28]

The court granted summary judgment for the defendant, saying that

> The whole theory of no invasion of privacy on a matter of public interest, and First Amendment protection, is the right of the people to know what goes on in matters of public interest. . . .[29]

Newsworthiness

The recent decision of a federal district judge in California is seen by many observers as an important precedent in determining the right of the press to publish information that might be an encroachment upon the privacy of an individual.

At issue in *Virgil v. Sports Illustrated*, 2 Med L Rptr 1271 (1976), was an article on body surfing. Virgil was interviewed several times. When he found out that the reporter planned to publish accounts of some of the crazy things he had done, Virgil "revoked all consent" to the article (which included two photographs of himself and other body surfers). The article was published anyway and the last two pages (of 11) dealt with Virgil.

The court dismissed his invasion of privacy suit. In its decision the court referred to the ruling of the appeals court that had remanded the case back to the district court:

> The standard of newsworthiness adopted by the Ninth Circuit is as follows:
> In determining what is a matter of legitimate public interest, account must be taken of the customs and conventions of the community; and in the last analysis what is proper becomes a matter of the community mores. The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public with decent standards, would say that he had no concern.[30]

Applying these guidelines, the district court found:

> Any reasonable person reading the *Sports Illustrated* article would have to conclude that the personal facts concerning Mike Virgil were included as a legitimate journalistic attempt to explain Virgil's extremely daring and dangerous style of bodysurfing at the Wedge.[31]

However, the court cautioned:

> This opinion should not be read as in any way endorsing no-holds-barred rummaging by the media through the private lives of persons engaged in activities of public interest under the pretense of elucidating that activity or the person's participation in it.[32]

In general, the only area in which photographers have had problems in securing privilege involves false light. Usually this comes about through unfortunate luck in matching captions to pictures with recognizable individuals who are innocent of whatever the caption or article charges them.

The privilege to publish photographs has been given broad interpretation in most cases. Even pictures which might realistically be considered as offensive can be run under the privilege of newsworthiness. One example of this was *Bremmer v. Journal Tribune Pub. Co.*, 247 Iowa 817 (1956).

Restrictions on Photographers

There are, however, limitations upon this privilege to photograph, in addition to the question of false light. In the Restatement of the Law Second, section 652A sets forth the general principle of privacy.

(1) One who invades the right of privacy of another is subject to liability to the other if the invasion is unreasonable.
(2) The right of privacy is invaded when there is
  (a) intrusion upon the seclusion of another as stated in sec. 652B; or
  (b) appropriation of the other's name or likeness, as stated in sec. 652C; or
  (c) publicity given to the other's private life, as stated in sec. 652D; or
  (d) publicity which places the other in a false light before the public, as stated in 652E.[33]

In 652D liability is present if the photograph is offensive to a "reasonable person" or if the matter is not of legitimate public concern. In 652E the same thing occurs regarding offensiveness but, instead of legitimate concern, the "actor" must have "knowledge of the falsity or acted in reckless disregard of it." Both of these restrictions are capable of broad interpretation.

Latest Ruling

In June, 1977, the U.S. Supreme Court handed down its decision in *Zacchini v. Scripps-Howard*. Zacchini performed a "human cannonball" act. He claimed that a television station, by taping and broadcasting his performance when he had told it not to, had appropriated his name and act. The high court agreed:

> . . . it is important to note that neither the public nor respondent will be deprived of the benefit of petitioner's performance as long as his commercial stake in his act is appropriately recognized.

Petitioner does not seek to enjoin the broadcast of his performance; he simply wants to be paid for it. . . .

We conclude that although the State of Ohio may as a matter of its own law privilege the press in the circumstances of this case, the First and Fourteenth Amendments do not require it to do so.[34]

The court made a distinction between this case involving a "right of publicity" and privacy cases involving false light. It is too soon to tell what effect this decision will have on the rights of photographers to document the news.

FOOTNOTES

1. Don R. Pember, *Privacy and the Press* (Seattle: University of Washington Press, 1972), pp. 23-25.
2. *Jones v. Herald Post Co.*, 230 Ky. 227 (1929) at 229.
3. George Chernoff and Hershel Sarbin, *Photography and the Law* (New York: American Photographic Book Publishing Co., 1971), p. 26.
4. *Lahiri v. Daily Mirror Inc.*, 162 Misc. N.Y. 776 (1937) at 782.
5. *Themo v. New England Pub. Co.*, 27 N.E.2d 753 (1940) at 755.
6. *Ibid.*
7. *Ibid.* at 753-54.
8. *Berg v. Minneapolis Star & Tribune Co.*, 79 F.Supp. 957 (1948) at 961.
9. *Peay v. Curtis Pub. Co.*, 78 F.Supp. 305 (1948) at 309.
10. *Martin v. Darton*, 210 Miss. 668 (1951) at 672.
11. *Ibid.* at 675.
12. *Leverton v. Curtis Pub. Co.*, 192 F.2d 974 (1951) at 977-78.
13. *Gill v. Hearst Pub. Co.*, 231 P.2d 570 (1951) at 570-71.
14. ———, 239 P.2d 636 (1952) at 638.
15. ———, 253 P.2d 441 (1953) at 444.
16. *Gill v. Curtis Pub. Co.*, 231 P.2d 565 (1951) at 568.
17. *Ibid.* at 567.
18. ———, 239 P.2d 630 (1952) at 633.
19. *Time Inc. v. Hill*, 385 U.S. 374 (1967) at 389.
20. *Ibid.* at 388.
21. *Ibid.* at 400.
22. *Holmes v. Curtis Pub. Co.*, 303 F.Supp. 522 (1969) at 527.
23. *Restatement of the Law—Second—Torts*, Tentative Draft No. 21 (Philadelphia: American Law Institute, 1975), p. 90.
24. ———, Tentative Draft No. 13 (1967), p. 121.
25. *Ibid.*
26. *Cantrell v. Forest City Pub. Co.*, 419 U.S. 245 (1974) at 253.
27. *Florida Pub. Co. v. Fletcher*, 2 Med L Rptr 1089 (1976) at 1096.
28. *Nelson v. Globe*, 2 Med L Rptr 1219 (1977) at 1220.
29. *Ibid.* at 1221.
30. *Virgil v. Sports Illustrated*, 2 Med L Rptr 1271 (1976) at 1272.
31. *Ibid.*
32. *Ibid.*
33. *Restatement*, No. 21, p. 88.
34. *Zacchini v. Scripps-Howard*, 45 LW 4954 (1977) at 4958.